IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 204

UNITED STATES OF AMERICA, *Appellant*

v.

ALUMINUM COMPANY OF AMERICA AND
ROME CABLE CORPORATION

On Appeal from the United States District Court for the Northern District of New York

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, appellees Aluminum Company of America and Rome Cable Corporation move that the judgment of the district court be affirmed on the ground that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the judgment of the district court holding that the acquisition of Rome Cable Corporation ("Rome") by Aluminum Company of America ("Alcoa") did not violate Section 7 of the Clayton Act, 15 U.S.C. 18. The Government does not challenge the court's findings of fact as "clearly erroneous" (Rule 52(a), Federal Rules of Civil Procedure) but urges that its ultimate findings on the line of commerce and competitive effect issues rested upon an erroneous interpretation of the statute (J.S., 14). It is appellees' position that the court, guided by this Court's decision in *Brown Shoe* v. *United States*, 370 U.S. 294 (1962), correctly applied the statute to the facts before it, that the court's reasoning is fully supported by both the *Brown Shoe* and *Philadelphia Bank*[1] cases, that no novel question of law is presented, and that the judgment should, therefore, be affirmed without further briefing and argument.

1. THE BACKGROUND OF THE ACQUISITION

The court described this acquisition as "the combination of an aluminum and an essentially copper manufacturing company" (App. A, 37a),[2] and found that it was undertaken by Alcoa "in the face of its declining market" (*ibid.*) for the purpose of obtaining insulating know-how and diversification needed "to overcome a market disadvantage . . ." (App. A, 22a). These facts, not challenged by appellant, provide the background for the acquisition.

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[1] *United States* v. *The Philadelphia National Bank, et al.* .... U.S. .... (1963); 31 L.W. 4650.

[2] All references to the district court's opinion and findings are to Appendices A, B and C to the Jurisdictional Statement.

(a) The Contrast Between Alcoa and Rome

Alcoa is an integrated producer of aluminum and aluminum products (App. B, Fdgs. 3 and 12). Prior to acquiring Rome, its participation in the electrical wire and cable field was limited to bare aluminum conductor-steel reinforced ("ACSR"), bare aluminum cable, and two simple insulated or covered products, weatherproof line wire and multiplex cable. Bare aluminum wire and cable, including ACSR, was by far Alcoa's main conductor product, accounting in 1958 for more than 90 per cent of its total wire and cable sales (App. B, Fdg. 14). It made no product using copper conductor, did not make or sell any of the more complicated types of insulated wire and cable (App. B, Fdg. 13), and accounted for only .3 per cent of total 1958 insulated wire and cable shipments (copper and aluminum) (App. A, 26a; App. B, Fdg. 76).

Rome was and is primarily a manufacturer of electrical wire and cable (App. B, Fdg. 16).[3] Its primary emphasis was on the manufacture of insulated products, and it had the capability, which Alcoa lacked, to manufacture a broad range of complex electrical cables (App. B, Fdg. 17). Copper was by far the predominant metal used by Rome, accounting in the five years preceding the acquisition for more than 90 per cent of its combined copper and aluminum purchases and for from 90.3 per cent to almost 94 per cent of its total wire and cable sales revenue (App. B, Fdgs. 18 and 68). Rome's share of total 1958 insulated wire and cable shipments (copper and aluminum) amounted to 1.3 per cent (App. B, Fdg. 76).

[3] It produced these products only at its Rome, New York, plant; the Collegeville, Pennsylvania, and Torrance, California, plants referred to in the Jurisdictional Statement (p. 4) have never produced wire and cable products (App. B, Fdg. 16).

With respect to ACSR and bare aluminum cable—by far Alcoa's principal wire and cable product—Rome's total 1958 sales were approximately $240,000, representing about .3 per cent of industry sales and about 1 per cent of Rome's total wire and cable sales (App. B, Fdgs. 16, 21, 45(a)). With respect to aluminum weatherproof line wire and multiplex cable—the only overlapping wire and cable products which both companies sold to more than a *de minimis* extent—Rome's sales in 1958 amounted to $1.7 million,[4] or about 7 per cent of its total wire and cable sales revenue (AR 56; App. B, Fdg. 16). Alcoa's sales of these overlapping insulated aluminum products amounted to $4.2 million in 1958, or about one-half of one per cent of its net sales and operating revenues for that year (App. B, Fdgs. 21 and 22).

(b) Alcoa's Declining Market Position

The Alcoa of the 1960's is not the Alcoa of 30 years ago, and the district court so found. Rejecting appellant's claim that Alcoa occupies a "dominant position" in the production of aluminum and aluminum wire and cable products, it found that Alcoa's position in these fields has "declined markedly in recent years" (App. B, Fdg. 15; App. A, 28a-29a). In primary aluminum production, the court found, Alcoa's market share had fallen from 52 per cent in 1948, to 45 per cent in 1956, to 36 per cent in 1960 (App. A, 11a). In ACSR and bare aluminum cable, the court found an even steeper drop: from 48.4 per cent in 1954, to 32.5 per cent in 1958, and, combined with Rome, to 26.1 per cent in 1961, nearly three years after the acquisition (App. A,

[4] In 1958, Rome sold these same products using copper as the conductor metal in the amount of approximately $2 million (AR 56).

12a). These substantial declines, the increase in the number of competing producers, and the decline in Alcoa's rate of return on invested capital from 9.3 per cent in 1950 to 3.7 per cent in 1961 were among the factors which led the court to conclude that Alcoa's position "is something less than dominant" (App. A, 21a, 28a-29a).

(c) Alcoa's Market Disadvantage

The court found (App. A, 12a), and appellant concedes (J.S., 9), that the recent increase in demand for covered or insulated aluminum products found Alcoa in an unfavorable market position since it lacked insulating capabilities. In 1952, as a partial solution, it entered into a tolling arrangement under which Rome made aluminum covered line wire and multiplex cable for Alcoa's account (App. B, Fdgs. 19 and 21). By the time of the acquisition, Alcoa had acquired the ability to make these two simple products (App. B, Fdg. 21), but, as the court found, still lacked the know-how and facilities "to manufacture the more complicated types of insulated wire and cable . . ." (App. A, 21a). Accordingly, as appellant concedes, "Alcoa could not offer customers a full line of its own insulated products, both aluminum and copper, as could certain of its competitors" (J.S., 9-10).

In the face of this competitive disadvantage and Alcoa's declining market position, the court found that "[t]he need for product diversification was apparent" (App. A, 21a-22a). Since the time and expense involved "seemed to foreclose" developing the required insulating competence from within its own organization, Alcoa approached and, on March 31, 1959, acquired Rome (*ibid.*). "Alcoa's purpose," the court found (App. B, Fdg. 7)

was to acquire the ability to manufacture the more complicated insulated wire and cable products and diversify its operations. *Rome's manufacture of aluminum products did not induce said acquisition.* [Emphasis added.]

In short, its objective was "to overcome a market disadvantage rather than to obtain a captive market . . . or to eliminate a competitor" (App. A, 22a).

2. THE PROCEEDINGS IN DISTRICT COURT

On February 5, 1962, after approximately 22 months of extensive pre-trial discovery, the four-week trial of this action commenced. At the trial, the court received more than 500 documentary exhibits and heard and observed more than 50 witnesses, among them engineers and purchasing agents for public utilities, experienced wire and cable technical, sales and managerial personnel, and defendants' executive officers chiefly responsible for the acquisition. Following the trial, the parties filed briefs and proposed findings of fact, submitted memoranda dealing specifically with the application of *Brown Shoe* to this case, and presented oral arguments.

On January 28, 1963, the court filed its Opinion and Findings of Fact and Conclusions of Law and dismissed the Complaint. With respect to the two alleged lines of commerce involved in this appeal[5]—aluminum

[5] Ten "lines of commerce" were asserted at the trial: (1) Aluminum conductor wire and cable; (2) Bare aluminum cable and ACSR; (3) Insulated or covered aluminum wire and cable; (4) Aluminum ingot and rod used in the production of aluminum conductor wire and cable; (5) Conductor wire and cable (aluminum and copper); (6) Conductor wire and cable, bare (aluminum and copper); (7) Wire and cable, insulated and covered (aluminum and copper); (8) Service drop cable (aluminum and copper); (9) Conduit (aluminum and steel); (10) Aluminum conduit.

conductor wire and cable and insulated aluminum wire and cable—the court held (1) that they were not proper lines of commerce and (2) even assuming that they were proper lines, the prohibited anticompetitive effect had not been shown.

The crucial line of commerce determination—that insulated aluminum wire and cable is not properly segregable from insulated copper wire and cable—was based on findings that the industry does not recognize insulated aluminum wire and cable as a separate economic entity (App. A, 15a; App. B, Fdgs. 25 and 26); that manufacturers of insulated wire and cable "switch readily" from one conductor metal to another, using the same machinery and personnel on both copper and aluminum (App. A, 15a; App. B, Fdgs. 27, 55 and 56);[6] that insulated copper and insulated aluminum products are functionally interchangeable and are sold by the same vendors to the same customers for the same end use (App. A, 15a-16a; App. B, Fdg. 28). Evidence of a copper-aluminum price differential, the court found, did not destroy the conclusion that there is "actual competition" between copper and aluminum insulated products (App. A, 16a). Purchasers consider "numerous economic factors in addition to the cost of the wire or cable itself" and "substantial quantities" of copper insulated products are sold in direct competition with aluminum products for the same end use (App. B, Fdgs. 28 and 29).

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[6] The fact that the manufacture of aluminum insulated products does not require unique production facilities, a fact relied on heavily by the court below, was entirely omitted from appellant's statement of the grounds of decision below (J.S., 12), notwithstanding that the Government, itself, stressed manufacturing interchangeability in the *Brown Shoe* case.

In concluding that the Government failed to prove the prohibited effect on competition in the alleged aluminum conductor lines of commerce, assuming each to have been established, the court relied on a variety of factors, including what "actually happened in the competitive market" in nearly three years after the acquisition (App. A, 32a). It refused to condemn the acquisition solely on the basis of market share statistics since such data not only showed Rome's shares to be comparatively small but demonstrated continuous and substantial declines in Alcoa's pre-acquisition market share and in the Alcoa-Rome combined share after the acquisition (App. A, 25a, 31a; App. B, Fdg. 45). The nonstatistical evidence established, *inter alia*, that Alcoa's purpose was to overcome the market disadvantage resulting from its lack of insulating capability and product diversity, not to obtain a captive market or eliminate a competitor (App. A, 21a-22a, 37a; App. B, Fdg. 7); that there was not substantial or vigorous competition between Alcoa and Rome prior to the acquisition (App. A, 32a; App. B, Fdg. 52); that there is complete and demonstrated ease of entry (App. A, 24a; App. B, Fdgs. 54-58); that neither competitors nor purchasers have been or expect to be adversely affected in any way by the acquisition (App. A, 27a-28a, 32a-33a; App. B, Fdgs. 59-66); and that there has been and continues to be vigorous competition in the manufacture and sale of aluminum wire and cable products (App. A, 33a; App. B, Fdg. 69).

ARGUMENT

This appeal challenges the district court's application of amended Section 7 to two alleged aluminum conductor lines of commerce. Since the trial court ruled against the Government on both the line of com-

merce and competitive effect issues, the appeal must fail if the court can be sustained as to either issue. In this Motion, adopting the Government's order of proceeding, it will be demonstrated, first, that the Government's contentions as to competitive effect are wholly without substance, even assuming the two alleged aluminum conductor lines could be established. In Part II, it will be shown that the district court was clearly correct in rejecting both of the alleged aluminum conductor lines.

I. NO SUBSTANTIAL QUESTION IS PRESENTED BY APPELLANT'S CONTENTIONS ON THE COMPETITIVE EFFECT ISSUE

In the face of clear and unchallenged findings establishing, *inter alia,* lack of any adverse effect on purchasers, competitors, or the public, absence of anti-competitive purpose, complete ease of entry, substantial pre and post-acquisition market declines, and undiminished vigor of competition, appellant is forced to advocate the following strictly quantitative, *per se* test of illegality (J.S., 14):

> in an industry already characterized by a high degree of concentration, the acquisition by the leading company of one of its few substantial independent competitors is a violation of Section 7, for in that setting, the effect of such an acquisition *necessarily* "may be substantially to lessen competition." [Emphasis added.]

The premises of this test are contradicted by the facts: in the ACSR and aluminum cable, bare, line of commerce, where Alcoa was the leading supplier, Rome was so insubstantial a competitor that appellant has abandoned that line; in the insulated aluminum field, where Rome was not *de minimis,* Alcoa was not

"the leading company," lagging substantially behind its rivals not only in sales but in technical competence and product diversity as well.

Furthermore, while appellant avoids using the expression "*per se*," its use of synonyms, such as "necessarily" (J.S., 14), "these facts themselves" (J.S., 20), and "these facts alone" (J.S., 24), clearly indicates that it is advocating a *per se* test of illegality. In the *Philadelphia Bank* case, however, decided after appellant had filed its Jurisdictional Statement, this Court refused to adopt such an absolute *per se* test. Instead, it formulated a rule creating a rebuttable presumption of illegality on the basis of statistics as to market shares and increase in concentration resulting from a merger. "Specifically," the Court said (31 L.W. at 4662)

> a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects.

The *Philadelphia Bank* case not only is dispositive of the Government's *per se* approach but strongly supports appellees' position. First of all, from the statistical standpoint, the market shares and increase in concentration attributable to this acquisition are far below levels suggested in the *Philadelphia Bank* opinion as possible bases of presumptive illegality. Secondly, there is here overwhelming market and historical evidence of the type deemed relevant in the *Brown Shoe* and *Philadelphia Bank* cases which affirmatively establishes that the acquisition is not likely to have the prohibited effect upon competition.

A. Market Share and Concentration Statistics Do Not Establish the Prima Facie Illegality of this Acquisition

Because of the "comparatively small percentages of the market which Rome held" and the substantial post-acquisition declines in the Alcoa-Rome market share, the court refused to condemn the acquisition on the basis of market statistics alone (App. A, 31a-32a). Analysis of these statistics for the two alleged aluminum conductor lines involved in this appeal will demonstrate that this acquisition is well outside of any area of *per se* or presumptive illegality, even assuming that the district court erred in its line of commerce determinations.

(1) Aluminum Wire and Cable, Insulated or Covered

As to this alleged line of commerce, appellant's basic premise that Alcoa was "the leading company" is demonstrably false. Alcoa, with 11.6 percent of total 1958 shipments, ranked a poor third, more than 60 per cent behind Kaiser, with 26.8 per cent, and more than 30 per cent behind Anaconda, with 16.9 per cent (App. B, Fdg 45; Gx 436). Moreover, not only did Alcoa lag far behind quantitatively, but it lacked the technical competence needed to make complementary insulated products, including copper products (App. A, 21a).

Analysis of the market share statistics makes plain that the court was absolutely correct in refusing to give controlling importance to such data (see App. B, Fdg. 45). Alcoa's share in 1958 was 11.6 per cent, and Rome's 4.7 per cent. The sum, 16.3 per cent, is not only far below the 30 per cent conservatively computed in *Philadelphia Bank,* but is substantially beneath the 20 to 25 per cent figures suggested as a test of *prima facie* unlawfulness by the economists cited in footnote

41. 31 L.W. at 4662. Moreover, the significance of the acquisition, considered solely in statistical terms, becomes even more tenuous in light of the substantial post-acquisition decline from a combined high of 16.6 per cent in 1959, to 14.8 per cent in 1960, and to 13 per cent in 1961. Thus, on the basis of the latest information available to the court, the market share of Alcoa-Rome combined is only 1.4 percentage points above the share held by Alcoa alone in 1958. This approaches *de minimis* (cf. *Tampa Electric Company* v. *Nashville Coal Company*, 365 U.S. 320, 328 (1961)) and certainly does not constitute a percentage increase sufficient to create *prima facie* illegality.

Appellant's claim that the acquisition enhances an already "high degree of concentration" (J.S., 14) has little application to the so-called insulated aluminum wire and cable line. Concentration percentages must be used with some discretion.[7] Here, such percentages have little or no competitive significance for the so-called "industry" excludes numerous fabricators presently making copper but not aluminum insulated products (App. B, Fdg. 81). Since wire and cable manufacturers "switch readily" from one conductor metal to another as market conditions dictate, and are constantly considering whether it would be profitable to do so (App. B, Fdgs. 27, 55 and 56), it is evident that

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[7] As the Senate Subcommittee on Antitrust and Monopoly warned in its publication, *Concentration in American Industry*, 85th Cong. 1st Sess., p. 4 (1957):

> Bare statistics necessarily omit many qualitative factors which are essential to a complete understanding of the competitive structure of the entire industrial economy or of an individual industry.

any anti-competitive effect of undue concentration in this "line" would be promptly offset.[8]

In any event, even taking the statistics at face value, this acquisition has not produced a "significant increase" in concentration. Prior to the acquisition, Alcoa ranked third; after the acquisition, the Alcoa-Rome combination was still third, and still substantially behind Kaiser and Anaconda (Gx 436). Moreover, the aggregate share of the five integrated producers has remained virtually unchanged. Starting at 65.4 per cent in 1958, it rose to 68.1 per cent in 1959, an increase of 2.7 percentage points. By the end of 1961, the same five companies accounted for 66.5 per cent, an increase of only 1.1 percentage points over 1958. Such increases in concentration not only are far below the 33 per cent increase deemed significant in the *Philadelphia Bank* case, but also are substantially below the 7 or 8 percentage point increase suggested by Professor Bok as a possible statistical test. See *United States* v. *Philadelphia National Bank, supra,* footnote 41.

Thus, it is clear that in this crucial alleged line of commerce the statistics fail to show that the merger has produced either "an undue percentage share" or "a significant increase in . . . concentration." Accordingly, there is not presumptive or *per se* illegality.

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[8] The competitive importance of this complete manufacturing interchangeability is demonstrated by the substantial increase in the number of companies supplying aluminum as well as copper products since 1951. The court found that this "gradual decentralization," which has seen the number of fabricators supplying aluminum insulated products increase from four to 29, greatly lessened the significance of the concentration statistics relied on by the Government (App. A, 22a-24a).

(2) Aluminum Conductor Wire and Cable

Appellant's second alleged line of commerce is nothing but a mathematical composite of (1) aluminum wire and cable, insulated or covered, and (2) ACSR and aluminum cable, bare. With respect to item (1), as just shown, the market percentages are not sufficient to establish *per se* or presumptive illegality. As to item (2), appellant is even weaker and does not challenge the district court's conclusion that the prohibited effect on competition has not been shown.[9]

The chief function of the composite line is to conceal the following infirmity in appellant's case: In bare aluminum, where Alcoa, though rapidly declining, was admittedly the leader, Rome was *de minimis;* in insulated aluminum, where Rome was more than *de minimis,* Alcoa, handicapped by its lack of insulating competence and product diversity, was not the leading company. Appellant's attempt to resurrect its statistical case by adding together bare and insulated aluminum shipments is nothing but a numerical trick since bare aluminum products are not even claimed to be competitive with insulated aluminum products, and "aluminum conductor wire and cable" is not recognized in the industry as a separate economic entity or submarket (App. C, Add'l Fdg. 4). In essence, the composite line is simply a device for inflating the

[9] In the bare aluminum line of commerce, Alcoa, with 32.5 per cent of the market in 1958, was the leading supplier. Rome, however, had only a .3 per cent market share and produced only a limited range of sizes (App. A, 30a). Moreover, the evidence shows a steady and substantial decline in Alcoa's position: From 48.4 per cent in 1954, to 32.5 per cent in 1958, and combined with Rome, to 26.1 per cent in 1961 (App. B, Fdg. 45). It was on the basis of these data, together with the market and historical evidence to be discussed below (pp. 17-22), that the court found for appellees.

market shares by capitalizing on Alcoa's position in ACSR and aluminum cable, bare, even though appellant no longer claims any prohibited effect in the bare aluminum line of commerce, itself.

In any event, the statistical evidence makes clear that the district court correctly refused to invalidate this acquisition solely on the basis of market share and concentration data. Such statistics show, first of all, that Alcoa's 27.8 per cent in 1958 was composed predominantly (more than 90 per cent) of ACSR and bare aluminum cable, while Rome achieved its still very minor position, 1.3 per cent in 1958, largely by virtue of its insulated aluminum sales.[10] Since insulated and bare aluminum products are used for different purposes and are not competitive with each other, these percentages clearly do not manifest any "inherently anticompetitive tendency." *Philadelphia Bank,* 31 L.W. at 4663.

Secondly, and even more important, the statistical evidence establishes a continuing and substantial de-

[10] The actual sources of the percentages relied on by appellant are exposed by the following table (based on App. B, Fdg. 45; Gx 434, 435, 436):

1958
(Thousands of Pounds)

		Alcoa		Rome	
	Total	Shipments	% of Total	Shipments	% of Total
ACSR and Aluminum Cable, Bare	175,157	56,990	32.5	537	0.3
Aluminum Wire and Cable, Insulated or Covered	51,346	5,970	11.6	2,411	4.7
Aluminum Conductor Wire and Cable	226,503	62,960	27.8	2,948	1.3

cline in Alcoa's market position which, by a considerable margin, has more than offset the small and purely numerical increase attributable to the Rome acquisition.[11] Thus, the Alcoa-Rome combined share at the end of 1959 was 28.4 percent, which is only .6 of a percentage point above Alcoa's 1958 share and is 14.4 percentage points *below* Alcoa's 1954 share. By 1961, the Alcoa-Rome combined share was 18 percentage points below Alcoa's 1954 share and 3 percentage points below its 1958 share. In sum, by the time of trial the share of this alleged line held by Alcoa and Rome combined was more than 10 per cent below the share held by Alcoa alone in 1958 and more than 40 percent below Alcoa's 1954 share.

In light of this substantial and continuing decline, it cannot even be suggested that this acquisition has produced any significant increase in either market shares or concentration. Accordingly, the court's rejection of a *per se* standard and its unwillingness to give controlling weight to the market share statistics in this spurious "line of commerce" were manifestly correct.

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[11] The extent of the decline is shown by the following table (based on App. B, Fdg. 45):

	Alcoa and Rome Individual Percentages					
	1954		1958		1961	
	Alcoa	Rome	Alcoa	Rome	Alcoa	Rome
ACSR and Aluminum Cable, Bare	48.4	0.2	32.5	0.3	26.1	..
Aluminum Wire and Cable, Insulated or Covered	10.0	6.9	11.6	4.7	7.3	5.7
Aluminum Conductor Wire and Cable	42.8	1.1	27.8	1.3	23.5	1.3

B. The Market and Historical Facts Affirmatively Establish the Absence of a Probable Anti-Competitive Effect

At the trial, appellees did not rest their defense solely on Rome's relatively minor position and Alcoa's steady and significant declines in the alleged aluminum conductor lines. Instead, they offered testimony from informed public utility purchasing agents, competing wire and cable fabricators, and Alcoa and Rome officials. This evidence, and the undisputed findings based thereon, affirmatively establish that this acquisition is not likely to have the prohibited effect on competition.

(1) The Absence of Significant Competition Between Alcoa and Rome

The court found that "prior to the acquisition, there was not substantial or vigorous competition between Alcoa and Rome in the sale of aluminum conductor wire and cable products" (App. B, Fdg. 52; App A, 32a). This finding is supported in part by records systematically maintained by Alcoa which show that while Alcoa lost substantial conductor business to other competitors during the two years preceding the acquisition, "its loss of business to Rome during the same period was insignificant" (App. A, 32a).[12] Furthermore, Alcoa and Rome had only relatively few common customers for the overlapping aluminum conductor products.[13] This virtual absence of competition between Alcoa and Rome is explained primarily by the

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[12] Specifically, out of nearly 80 million pounds of electrical conductor business reported lost to competition, less than 40,000 pounds or about 5/100 of 1 per cent (.05 per cent) was reported lost to Rome (Tr. 1284-1316; AR 29 and 29a).

[13] Appellant concedes that in 1958 only 10 out of the more than 3,300 public utility companies made significant purchases (i.e., more than $1,000) of the overlapping aluminum products from both Alcoa and Rome. (Defts.' Prop. Fdg. 48, agreed to by appellant.)

fact that Rome had only *de minimis* sales of ACSR and bare aluminum cable which constituted more than 90 per cent of Alcoa's wire and cable sales (App. B, Fdgs. 14, 17, 18 and 45).

(2) The Lack of Effect on Competitors

Prior to trial, the Government maintained that this acquisition made it "more difficult for the remaining non-integrated producers to compete and survive" for "[t]hey now must face a competitor whose dominance in the field has been substantially increased . . ." (Trial Brief of the U. S., p. 65). At the trial, this contention was interred by the concrete and unequivocal testimony of nonintegrated fabricators. This testimony, appellant concedes, established that such companies have increased their aluminum wire and cable sales since the acquisition, and have either built new plants or expanded existing plants in order to increase their capacity for making such products (Defts.' Prop. Fdg. 52 (a), (b), (c) and (e), agreed to by appellant). No such manufacturer, the court found, had suffered any adverse effect, nor did any foresee any future adverse effect as a result of this acquisition (App. B, Fdg. 50; App. A, 33a). Statistical evidence showing a marked increase in the nonintegrated producers' aggregate market share since the acquisition confirms the oral testimony and further demonstrates that competition is not likely to be impaired through a withering away of nonintegrated fabricators.[14]

[14] The figures show that in the period from 1958 to 1961, the nonintegrated producers, as a group, have increased their market share in insulated or covered aluminum from 29.8 per cent to 33.5 per cent, during which time the Alcoa-Rome share declined from 16.3 per cent to 13 per cent, and that their share in the composite line has remained substantially unchanged while the Alcoa-Rome share has declined from 29.1 per cent in 1958 to 24.8 per cent in 1961 (App. A, 32a).

(3) Ease of Entry

The court's finding that "no serious impediment or barrier" to entry exists is abundantly supported by the record. (App. A, 24a). Indeed, the term "entry" is a misnomer for, as the court found, fabricators already in the wire and cable business—of which there are upwards of 200, "among them many strong, well financed and highly reputable concerns" (App. B, Fdg. 81)—"switch readily from one product or conductor metal to another in accordance with market conditions . . ." (App. B, Fdg. 56). Since a fabricator of copper products can "readily" make aluminum products "with its existing machinery and personnel" (App. B, Fdgs. 27, 55; App. A, 15a), clearly "entry" is a simple matter. Moreover, this is not just a theoretical possibility, for when the price of copper rose in the early 1950's, creating favorable opportunities for aluminum conductor products, the number of suppliers increased "from four to twenty-nine and most of the new entrants came from the ranks of insulated copper conductor producers . . ." (App. A, 24a). This fact, the court found, is "indicative that entry into the aluminum conductor field is dictated by the status of the competition rather than being controlled by actual economic barriers" (*ibid.*).

(4) The Absence of a Significant Merger Trend

Contrary to *Brown Shoe*, where the district court found definite and substantial acquisition trends in which *Brown Shoe*, itself, was a "moving factor" (370 U.S. at 302), the court here found neither a "significan pattern or trend of mergers" for the industry as a whole (App. B, Fdg. 46), nor any prior "history of acquisitions or mergers" by Alcoa (App. A, 23a).

The court's finding as to the lack of any significant merger trend is strongly supported by the record. Olin Mathieson, a partner in a relatively new primary aluminum producing joint venture, was not even in the wire and cable business prior to its acquisition of Southern Electrical;[15] U. S. Rubber, which was acquired by Kaiser in 1957, was less than a 1 per cent factor in aluminum conductor products; and Roebling, whose wire and cable machinery was acquired by Reynolds, never was more than a .1 per cent factor and is conceded by appellant not to have been a substantial independent competitor (App. A, 23a; App. B, Fdg. 48; J.S. 23). The minor importance of these acquisitions, together with the demonstrated post-acquisition declines of the merging companies (App. B, Fdg. 48), fully supported the court's conclusion.

Appellant's concern about "creeping concentration" is likewise entirely misplaced insofar as Alcoa is concerned. Alcoa has achieved its objective in obtaining insulating know-how, does not contemplate "future expansion through mergers or acquisitions" in the wire and cable field (App. B, Fdg. 11), and, therefore, there is no indication that Alcoa will seek to expand its "power by successive small acquisitions . . ." (S. Rep. 1775, 81st Cong. 2d Sess. 5, quoted J.S. 20).

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[15] The acquisition of Central Cable by Aluminium, Ltd., which is referred to by appellant, though completely *dehors* the record, also did not elminate or lessen competition since Aluminium was not previously in the wire and cable business. The same is true as to Harvey Aluminum Company, which appellant asserts has considered acquiring a wire and cable producer (J.S., 19).

(5) The Lack of Anti-Competitive Purpose

Relying on this Court's assertion in *Brown Shoe* that a most important factor is "the very nature and purpose of the arrangement," 370 U.S. at 329, the court gave weight to the fact that Alcoa acquired Rome in order to diversify its operations, not "to obtain a captive market for its product or to eliminate a competitor" (App. A, 22a), nor because Rome manufactured aluminum products which Alcoa already was selling (App. B, Fdg. 7). Such findings, while not necessarily conclusive, are highly relevant for, as the Court observed in *Brown Shoe,* 370 U.S. at 329, footnote 48,

> evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger.

(6) The Lack of Effect on Consumers

Finally, recognizing that one test of a competitive market is "whether consumers are well served," *Philadelphia Bank,* 31 L.W. at 4663, footnote 43 appellees offered the testimony of purchasing agents for eight of the ten public utilities which bought aluminum conductor products from both companies prior to the acquistion. These witnesses explained the manner in which they purchased these products, identified their suppliers before and after the acquisition, and described Rome's position and practices. As the court found, these witnesses "all testified without exception that the acquisition has not had an adverse effect upon the purchasers of such products"; "that no difficulty has been encountered in expanding their list of suppliers and that competition among such suppliers has not been affected" (App. A, 28a); and that prior to the acquisition, Rome was a follower rather

than an initiator of price reductions and "was not an aggressive price competitor" (App. B, Fdgs. 53 and 61). The court concluded that consumers "have not been and will not be adversely affected by the Rome acquisition" (App. B, Fdg. 59).

II. NO SUBSTANTIAL QUESTION IS PRESENTED BY APPELLANT'S CONTENTIONS ON THE LINE OF COMMERCE ISSUE

Although acknowledging that the line of commerce issue "lies at the threshold of every Section 7 case" (J.S., 24), appellant postpones discussion of that issue until near the close of its Jurisdictional Statement. The confession of weakness so clearly implied by this departure from logic is well founded.

The critical line of commerce question for appellant is whether aluminum wire and cable, insulated or covered, is a proper line of commerce. If it is not, then, as appellant concedes, aluminum wire and cable, composed of bare and insulated aluminum products, also is not a proper line of commerce (J.S., 28-29).[16] Accord-

[16] On the other hand, even if insulated aluminum were a line of commerce it would not necessarily follow that the combination of noncompetitive bare and insulated aluminum products is a proper line of commerce. Contrary to appellant's contention (J.S., 28), the fact that the court found "conductor wire and cable," including both bare and insulated, and aluminum and copper, products to be a line of commerce is no support for giving similar recognition to the combination of noncompetitive bare and insulated *aluminum* products. "Conductor wire and cable," the court found, corresponds to the "generally recognized electrical wire and cable industry" (App. B, Fdg. 31). Here, however, contrary to appellant's assertion, the court rejected the so-called aluminum conductor line not only because it failed to include copper equivalents of insulated aluminum products, but also because the evidence failed to show that the combination of bare and insulated aluminum wire and cable "is generally recognized in the industry as a separate economic entity or submarket" (App. C, Add'l Fdg. 4).

ingly, this argument will focus on the alleged aluminum insulated line.

The Government's basic contention is that the district court, in refusing to segregate insulated wire and cable products made with aluminum conductor from the equivalent copper products, misapplied the guidelines laid down by this Court in *Brown Shoe*. None of the court's underlying findings of fact is challenged as "clearly erroneous."

In *Brown Shoe*, this Court, quoting from the *duPont-General Motors* opinion,[17] declared (370 U.S. at 324):

> [d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected.

It went on to say that the "area of effective competition" must be determined in part by reference to a product market; that there are broad product markets whose outer boundaries are determined by interchangeability of use or cross-elasticity of demand; and that within such broad markets may be "well-defined" and "economically significant" submarkets within which the probable effects of a merger may be measured. 370 U.S. at 325. The Court made no attempt to establish any rigid formula for determining the boundaries of a submarket. Rather, it indicated that a broad ranging and pragmatic evaluation of market realities

[17] *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

was required. Courts were admonished to examine (*ibid.*),

> such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

In this case, the district court, after obviously conscientious study of *Brown Shoe,* observed that "no rigid formula exists" for determination of the relevant product market, that "the realities of competition are the ultimate test," and that "the existence or nonexistence of each of the above indicia is not determinative of the problem itself" (App. A, 5a-6a). Contrary to the Government's insinuation that the court carelessly and thoughtlessly considered the line of commerce question, and merely "ticked off" the listed indicia (J.S., 24), the court made numerous and detailed findings of fact supporting its ultimate conclusion. On the basis of these undisputed findings, it is readily apparent that it would have been unrealistic for the court to make the further subdivision sought by appellant.

A. The Court's Line of Commerce Findings

At the trial more than a dozen witnesses with long experience in the business testified as to the relationship between copper and aluminum in the wire and cable industry. On the basis of this testimony, together with supporting documentary evidence, the court found that insulated wire and cable manufacturers regard themselves simply as insulators of wire and cable, not as copper insulators on the one hand, or aluminum

insulators on the other (App. B, Fdg. 26), that the industry defines insulated wire and cable products according to function or type, not according to the metal used as conductor (App. B, Fdg. 25),[18] and that, in general, insulated aluminum wire and cable "is not recognized in the industry as a separate economic entity" (App. A, 15a).

One of the most significant facts for determining "the area of effective competition" is that no unique production facilities are required for making aluminum, as opposed to copper, insulated products. Thus, the industry testimony overwhelmingly established, and the court found, that wire and cable manufacturers can draw, strand, and insulate copper and aluminum interchangeably on the same equipment and with the same personnel (App. B, Fdg. 27); that, in fact, such manufacturers constantly review their product lines, and "switch readily" from one product and conductor metal to another in accordance with market conditions (App. B, Fdg. 56); and that manufacturers not presently making aluminum conductor products have considered doing so and would if profitable orders were obtained (*ibid.*). These competitive realities, which accord with industry usage and understanding, clearly place copper and aluminum insulators within a single "area of effective competition."

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[18] That is, products are designated as "building wire," "power cable," "magnet wire," etc., whether made from copper or aluminum. This finding is amply supported by, among other things, authoritative technical manuals (AR 25-28), the Standard Industrial Classification Manual published by the United States Bureau of the Budget (AR 74), product classifications established by the Bureau of Census (AR 9), and the Wire Buyers' Guide, official publication of the Wire Association (AR 73).

Finally, the court found that aluminum and copper insulated products are sold, "in actual competition" with each other, by the same vendors to the same customers for the same end use (App. A, 15a-16a; App. B, Fdg. 28). This conclusion, the court found, is not destroyed by the existence of a copper-aluminum price differential (App. A, 16a). Cable purchases are not dictated solely by the price of the cable, itself, but involve evaluation of numerous additional economic factors which determine final installed cost (App. B, Fdg. 28). Since such factors—e.g., labor costs, costs of installation materials, costs of connections, salvage value—tend to favor copper,[19] the economic contest is not one-sided. As the court found, "even with respect to" insulated overhead products "where aluminum has gained its greatest acceptance," "substantial quantities are sold using copper as the conductor" (App. B, Fdg. 29).[20]

B. Appellant's Contentions on Line of Commerce Are Without Substance

Appellant contends that the district court erred in making a pragmatic, multi-factor analysis based on all of the *Brown Shoe* indicia. Instead, appellant urges it should have based its determination solely upon the copper-aluminum price differential (J.S., 25, 30), even though, as the court found, such differential does not foreclose "lively," "active," and "actual" com-

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[19] Deft's Prop. Fdg. 30(a), agreed to by appellant. See also Tr. 1345-54, Tr. 383-89, AR 76.

[20] According to the Government's own evidence, 22.8 per cent of new overhead insulated or covered lines added in 1959 used copper conductor. In dollar terms, this amounted to, conservatively, $15,000,000. Tr. 581-86.

petition between aluminum and copper insulated products (App. A, 10a, 16a). This is a startling position for the Government to take, particularly in view of this Court's holding in *Brown Shoe* that "'price/quality' differences" are not sufficient to segment product lines "where, in fact, competition exists," and where, as here, the other "practical indicia" demonstrate the inappropriateness of further subdividing the market. 370 U.S. at 326.

Typical of the Government's disregard of the competitive realities is its contention that the copper-aluminum price differential imposes a competitive disadvantage on "fabricators of insulated copper cable." "Utilizing a high-cost metal," appellant says, such fabricators (J.S., 27)

> are powerless to eliminate the price disadvantage under which they labor and thus are not in a position to compete effectively in the overhead distribution field.

Even leaving to one side the other economic factors which mitigate the alleged price disadvantage (*supra*, p. 26), this wholly misconceives the court's findings as to the nature of competition in the insulating business.

We are not dealing here with competition between different metals, but with competition among fabricators of insulated wire and cable products. Contrary to appellant's assumption, such fabricators are not captives of one particular metal, but move freely between copper and aluminum, using the same machinery and personnel, in accordance with market conditions (App. B, Fdgs. 27, 55, 56). Should any fabricator of

overhead distribution products feel himself at a competitive disadvantage owing to the use of copper, he is not "powerless" for he can and will use aluminum. Since he will still be making the same product[21] on the same machinery and with the same personnel, and will still be selling to the same utility customers for the same end use, it is completely unrealistic to assert that merely by changing raw material, he thereby transfers from one line of commerce to another.

A similar misconception is involved in appellant's claim that (J.S., 28)

> the availability of a copper substitute exerts little, if any, restraint upon the power of the aluminum cable manufacturers to raise the price of their product.

This contention completely ignores the fact that there is no static group of "aluminum cable manufacturers." On the contrary, as the court expressly found, wire and cable fabricators move freely from one conductor metal to another, and, in a continuing dynamic process, re-evaluate their product lines and consider how their insulating capacity should be allocated between copper and aluminum. In these circumstances, "aluminum cable manufacturers" are subject to rigorous competitive forces which affect the pricing of aluminum cable products; for, in addition to the competition which the court found copper insulated products afford, there is the unavoidable prospect that insulating capacity previously devoted to copper will be used on aluminum if the price of aluminum in-

[21] See note 18, *supra*.

sulated products should increase.[22] The effective restraint stemming from the manufacturing interchangeability and other competitive realities found by the court illustrates why this Court, in *Brown Shoe,* included "separate economic entity," "unique production facilities," and "specialized vendors" among the "practical indicia" to be examined in determining the "area of effective competition." 370 U.S. at 325.

Finally, recognizing that the court's finding that there is "lively," "active," and "actual" competition between copper and aluminum insulated products seriously undermines the economic significance of the alleged copper-aluminum price differential, appellant now contends that at the time of the acquisition (J.S., 27)

> "actual competition" between the two metals in the field of overhead distribution was rapidly disappearing—just as it had already disappeared in the field of overhead transmission, where bare aluminum, having almost completely displaced bare copper, was conceded by Alcoa and found by the court to be a distinct line of commerce.

This goes beyond anything the Government even attempted to prove at the trial and fails to take account of important distinctions between the role of aluminum

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[22] The magnitude of the competitive restraint imposed by the existence of insulating capacity not presently used on aluminum is indicated by the court's findings that there are "upwards of 200 companies" in the wire and cable business and that such companies produced in 1958 insulated products valued at more than $1.3 billion, only a small fraction of which represented aluminum products (App. B, Fdgs. 29 and 81).

in bare transmission as opposed to insulated or covered distribution products.[23]

(1) At the trial, the Government offered a report (Gx 468) and expert testimony (Tr. 554-89) based on a survey of 93 electric utilities. This evidence indicated that from 1950 to 1959 the use of aluminum conductor in new insulated or covered overhead lines had increased from 6.5 per cent in 1950 to 77.2 per cent in 1959. In addition to seeking information as to actual use in prior years, the questionnaire used in this survey asked the utilities to state whether they "expect any increase or decrease in 1960 and in subsequent years in the proportion of aluminum to copper used in any classification of . . . (overhead lines)" (App. D to Gx 468).

Varying responses, wholly insufficient to establish the nature of any future trend, were received. Accordingly, the Government's expert, both in his written report and in his oral testimony, refused to make any projection of the trend beyond 1959, and candidly stated that information received regarding expected future use of copper and aluminum was "not susceptible to tabulation and was not tabulated in [the] re-

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[23] In addition, this contention distorts completely the basis of appellee's concession that ACSR and bare aluminum cable may be regarded as a separate line of commerce. That concession was not based solely on the fact that aluminum has substantially displaced copper in the bare transmission field but rested also on a number of additional facts applicable to bare, but not to insulated or covered, aluminum products. Among such additional facts were the technological advantages of bare aluminum over bare copper; that ACSR and aluminum cable, bare, is "generally recognized as a separate product classification"; and that "the manufacture and sale of these products require special stranding equipment and designing skill" (App. B, Fdg. 24).

port" (Tr. 558). Reflecting the absence of probative evidence as to future use of aluminum in insulated or covered distribution products, the Government did not even propose a finding of fact that the trend toward aluminum would continue into the future, let alone that copper-aluminum competition would eventually "disappear" with respect to insulated or covered products.

(2) The Government's claim that copper will be displaced in the insulated or covered field to the same extent as bare copper has been displaced in the overhead transmission field is wholly at variance with the findings and the evidence. In the overhead transmission field, aluminum has positive technical advantages over copper. For example, its lighter weight results in important economies in installation and the larger size required helps to avoid corona loss (e.g., Tr. 282-84). In the insulated field, however, these technological advantages of aluminum do not apply. As the court found, copper and aluminum are "completely interchangeable from a performance standpoint [and] utility companies choose between copper and aluminum insulated or covered overhead products solely on the basis of economics" (App. B, Fdg. 28). In fact, as shown above (p. 26), the nonprice variables tend to favor copper, not aluminum as in the bare transmission field. This explains why a utility company's decision "requires evaluation of numerous economic factors in addition to the cost of the wire or cable itself" (App. B, Fdg. 28), and why, despite the price differential relied on so heavily by appellant, the court found that "substantial quantities" of insulated or covered overhead distribution products are sold using copper conductor (App. B, Fdg. 29).

CONCLUSION

The decision below is correct, and this appeal presents no questions warranting further briefs and oral argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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